U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 July 2004

CASE NO.: 2003-LHC-2502

OWCP NO.: 02-131533

IN THE MATTER OF

ANDRE HOLMES,
Claimant

v.

WORLDWIDE LABOR SUPPORT
KVAERNER PHILADELPHIA SHIPYARD, INC.
AVONDALE, INDUSTRIES
Employers

and

SIGNAL MUTUAL INDEMNITY ASSN., LTD,
Carrier

APPEARANCES:

CHRISTOPHER R. SCHWARTZ, ESQ.
On behalf of the Claimant

V. WILLIAM FARRINGTON, JR., ESQ.
On behalf of Employer Worldwide Labor Support

JOHN E. KAWCZYNSKI, ESQ.
On behalf of Employer Kvaerner Philadelphia Shipyard, Inc.

FRANK J. TOWERS, ESQ.
On behalf of Employer Avondale Industries

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Andre Holmes (Claimant) against Employers Worldwide Labor Support (herein Worldwide), Kvaerner Philadelphia Shipyard, Inc. (herein Kvaerner) and Avondale Industries (herein Avondale) and Carrier Signal Mutual Indemnity Association, Ltd.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Metairie, Louisiana, on May 18, 2004. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Claimant's Exhibits CX-1 through CX-15[1];
2. Worldwide's Exhibits R-1 through R-16;
3. Kvaerner's Exhibits K-1 through K-5; and
4. Avondale's Exhibits EX-1 through EX-14.

Based upon the evidence introduced and the arguments presented, I find as follows:

I. ISSUES

The unresolved issues in this proceeding are:

1. Fact of accident/injury.

2. Causation.

3. Nature and extent.

4. Suitable alternative employment.

5. Average weekly wage.

6. Responsible employer.

7. Reasonable and necessary medical treatment.

[1] The Court notes that Claimant's exhibit book does not contain exhibit 4.

II. STATEMENT OF THE CASE

Claimant's Testimony

Claimant is a forty-nine year old man who resides in Harvey, Louisiana. He has an eleventh grade education and a welding certificate. (Tr. 12). Claimant had no earnings in 1972 or 1973. He also earned nothing in 1983, 1984, 1985 and 1986. In 1999, Claimant earned $4,446.63. In 2000, he earned $9,290.99. (Tr. 38).

After Claimant began working for Worldwide, he was sent to Kvaerner to work as a first class journeyman welder in August or September 2001. (Tr. 13-14, 17). Worldwide paid for Claimant to take a bus to Philadelphia for the job, and he paid for his hotel room out of his per diem. (Tr. 14-15). Worldwide transported its employees from the hotel to the shipyard. (Tr. 15). Claimant earned about $16 per hour and wore Kvaerner's company coveralls and identification badge at work. (Tr. 16). Claimant testified that Kvaerner had its own welders and assorted other laborers, but Worldwide provided welders and fitters. (Tr. 17). According to Claimant, the Worldwide employees worked under Kvaerner's supervision. (Tr. 19).

Claimant testified that he was injured at the shipyard while welding on an incline position. (Tr. 17-18). He explained that he felt a pinched nerve in his neck and reported his condition to the coordinator. (Tr. 18). Claimant agreed that the neck pain was the result of being in the same position for a prolonged amount of time, rather than the result of a specific injury. (Tr. 59). Claimant was taken to the doctor, where he reported that he had hurt his neck and shoulder. (Tr. 18, 37). Claimant denied telling the doctor that he had hurt his knee as well. (Tr. 37). In any case, the doctor examined Claimant and prescribed some pain medication and muscle relaxers. Claimant was told to return for therapy two to three times a week. Claimant testified that returned to work without attending therapy because his coordinator told him that he would be responsible for getting himself to the appointments and he did not know the area well. (Tr. 18).

According to Claimant, he was fired by Kvaerner shortly after this incident for "drinking too much coffee," although he felt that he was fired because he had been injured. (Tr. 19). Claimant agreed that he last worked at Kvaerner's shipyard on November 11, 2001. (Tr. 33). He thereafter returned home to Louisiana. (Tr. 20).

Claimant started working for Avondale on November 30, 2001, and last worked February 13, 2002. (Tr. 30, 33, 36). He acknowledged that he had indicated on his Avondale job application that he had quit at Worldwide, rather than being fired. (Tr. 40-41). In addition, Claimant indicated on the application that he was a high school graduate, although he is not. (Tr. 42). On the application, Claimant denied a history of back pain and also denied any difficulty moving his head up and down or side to side.

(Tr. 42-43, 46). Claimant testified that at the time of the application, he did not have any back pain. (Tr. 45).

On the application, Claimant indicated that he had last seen a doctor in 2000. (Tr. 46-47). At the hearing, he explained that he did not consider the doctor who examined him in Philadelphia to be a doctor because she did not x-ray him or determine what was wrong with his neck and shoulder. (Tr. 47). On the application, Claimant also denied that he had ever sustained a work-related injury, although he acknowledged several work-related injuries at the hearing. (Tr. 47-49). He testified that he did not tell Avondale about his recent neck injury because he did not believe the injury was serious at the time but also admitted that he was worried that Avondale would not hire him if they knew about the injury. (Tr. 50-52).

In any case, after undergoing a physical and a welding test, Claimant was hired at Avondale. He had no neck problems at that time. (Tr. 20). Claimant earned about $13 per hour and welded in the bottom of a ship. (Tr. 21, 29-30). He worked forty hours per week and occasionally worked overtime. (Tr. 29, 31). Claimant affirmed that he worked in tight quarters and had to squat and stoop at times but did not really notice that the work was putting a strain on his neck. (Tr. 30-31). At some point, Claimant injured his eye at work when he suffered a flash burn. He reported this injury and was treated for it. (Tr. 52). Claimant testified that he stopped working at Avondale after suffering a flare up of neck and shoulder pain from the previous incident at Kvaerner. (Tr. 22). Claimant affirmed that this pain was the same pain that he had felt after the previous injury. (Tr. 53). Claimant did not report the injury to Avondale but instead called Worldwide to report a reinjury. Worldwide sent Claimant to Dr. Robert Shackleton, who treated him for three or four months. (Tr. 23). Claimant testified that he gave Dr. Shackleton an accurate history of his condition. He was aware that his continuation of treatment with Dr. Shackleton was denied in April 2002. (Tr. 55).

Claimant currently treats with Dr. Paul Hubbell. He has had six injections and two nerve blockers. He testified that he is unable to return to work. (Tr. 23). Although Dr. Shackleton released Claimant to light duty, no one has offered Claimant light duty work. (Tr. 23-24). Dr. Hubbell has recommended neck surgery. (Tr. 28). Until September 2003, Claimant was receiving $776 in compensation every two weeks, but now he receives only $241.51. (Tr. 24). He did not know who was paying this compensation and was unaware that Worldwide has denied his claim. (Tr. 24-25). Claimant testified that until recently, he did not receive his workers' compensation checks on a regular basis. He testified that his medical bills have been paid but his mileage has not. (Tr. 26).

Claimant affirmed that in 2001, he only worked for Worldwide and Avondale. In 2000, Claimant earned $9,290.99 in 2000 but did not recall for whom he was working at that time. Likewise, Claimant earned $4,447.63 in 1999 but did not recall his employer during that year. (Tr. 38).

Testimony of Christine Coker

Ms. Coker is the medical coordinator for the first aid station at Northrop Grumman Ship Systems (Avondale). (Tr. 61-62). As part of her job, she reviews injury records and does the OSHA reporting. She testified that in Claimant's file, there was no record of an incident or event involving his back or neck between December 2001 and February 2002. (Tr. 62). The only injury indicated during this time was to Claimant's eye. (Tr. 62-63).

Deposition of Wayne Cook, Jr.

Mr. Cook is the president of Worldwide. (CX-15, p. 5). Worldwide hires welders and contracts them out with various companies, including Kvaerner. (CX-15, pp. 5-6). As part of the contract with Kvaerner, Worldwide was required to indemnify Kvaerner for any injury which might occur to Worldwide employees at the shipyard. (CX-15, pp. 25-26). When Worldwide contracted with Kvaerner in 2001, Worldwide contracted out all the payroll and workers' compensation to a firm called American PEO. (CX-15, p. 8). American PEO was sold to the Cura Group, which handled Claimant's workers' compensation claim. (CX-15, pp. 9-10). All payments for Claimant's compensation and medical bills were handled by American PEO and then Cura. (CX-15, p. 24).

While Claimant was at Kvaerner, he was paid $15.50 per hour. (CX-15, p. 13). He received a $60 per diem and stayed in a Holiday Inn which cost about $35 per night. (CX-15, pp. 11-12). Worldwide paid for the workers to travel to Philadelphia and then deducted the travel expenses from their checks. (CX-15, p. 12). The Worldwide employees worked over forty hours a week, and both Kvaerner and Worldwide kept track of the time sheets. (CX-15, pp. 13-14). During his period of employment with Worldwide, Claimant earned $7,112.91 in gross wages. (CX-15, p. 17).

Mr. Cook was aware of what happened to Claimant but did not know why he was terminated at Kvaerner. (CX-15, pp. 10-11). When Claimant was injured, he was sent for medical treatment by Dave Lishman, Worldwide's on-site coordinator. (CX-15, p. 19). Mr. Lishman completed a first report of injury, and Glen Cumbest, who worked for Kvaerner, also completed some injury forms. (CX-15, p. 20).

Deposition of Michael Giantomaso

Mr. Giantomaso is the vice president of human resources at Kvaerner, which is a shipbuilding company adjacent to the Delaware River and the Schuylkill River. (K-5, pp. 5-6, 15). His duties include quality assurance, safety, security, training and labor relations. (K-5, p. 6). Kvaerner hires contract employees on an as-needed basis through companies like Worldwide. (K-5, p. 7).

During the time that Claimant was employed at Kvaerner, Kvaerner had a blanket order in effect with Worldwide. (K-5, p. 8). Under the terms and conditions, Worldwide was required to carry workers' compensation insurance. (K-5, p. 9). Worldwide provided its employees with their safety equipment, and if Kvaerner supplied the Worldwide employees with any equipment, Worldwide paid for it. (K-5, p. 17). Mr. Giantomaso testified that Kvaerner supervisors oversaw the work of contract employees if they were working as supplemental employees within the team of Kvaerner workers. (K-5, pp. 17-18). If Kvaerner was unsatisfied with the work of a Worldwide employee, the company would inform Worldwide that the employee should be discharged. (K-5, p. 18).

Mr. Giantomaso was unaware of whether Claimant reported an accident to the Kvaerner company nurse and did not believe that Kvaerner's workers' compensation carrier ever paid benefits to Claimant. (K-5, p. 13).

Medical Evidence

Medical Records of Kathleen M. Goldstein, M.D.

Dr. Goldstein examined Claimant on October 26, 2001. Claimant reported that he had stopped working at 4:00 a.m. that morning and had been unable to sleep due to neck pain. He claimed injuries to the left knee, neck and shoulder. Claimant told Dr. Goldstein that he was kneeling and looking upward for prolonged periods of time while welding and noted pain in his left knee and shoulder. He denied any prior injuries to the neck or shoulder. An examination of the cervical spine revealed no gross soft tissue swelling or deformity. There was tenderness to palpation of the left paracervical muscles from C4-C7. Dr. Goldstein's impression was left cervical strain and left trapezius myofascitis. (EX-9, p. 1). Claimant was given medication and was returned to work with restrictions. Dr. Goldstein also scheduled Claimant for formal physical therapy. (EX-9, p. 2).

Medical Records of Robert Shackleton, M.D.

On February 14, 2002, Claimant first presented to Dr. Shackleton, an orthopedic surgeon, with complaints of neck pain running down both arms and numbness in the left arm. Claimant told Dr. Shackleton that he had injured his neck while working at Kvaerner. Upon examination, Claimant had tenderness about the left neck, trapezius and deltoid area but no atrophy. His cervical spine motion was mildly restricted. X-rays showed no fractures or dislocations in the neck. Dr. Shackleton's impression was chronic neck sprain and left shoulder impingement syndrome. He prescribed some pain medication and ordered physical therapy but felt that Claimant was able to return to work at a light duty level. (EX-6, p. 39).

On February 19, 2002, Claimant had not yet attended therapy. He told Dr. Shackleton that he could not return to work as a welder because of the climbing and awkward positions in which he worked. (EX-6, p. 27). Dr. Shackleton stressed the need for Claimant to be in physical therapy. He released Claimant to light duty with no lifting of more than twenty-five pounds at a time and no long climbing. On February 26, Claimant returned and reported that he had not returned to work because there was no light duty available. His pain was still present, and no changes were noted. (EX-6, p. 38).

On March 19, 2002, Claimant returned with the same complaints. The physical therapist had noted a mild increase in Claimant's cervical spine motion with some symptomatic decrease in pain. Dr. Shackleton recommended an EMG nerve conduction study of the left upper extremity and cervical paraspinous muscles. Claimant was to continue taking medication and attending physical therapy. (EX-6, p. 37). On April 9, Dr. Shackleton noted that Claimant's condition had not improved with therapy. He decided to stop prescribing narcotic pain medication for Claimant. (EX-6, p. 36).

On April 30, 2002, Claimant returned to Dr. Shackleton. The EMG nerve conduction study had revealed no abnormalities. Claimant's left arm radicular symptoms had decreased somewhat. His cervical spine motion was very restricted, and his left neck and shoulder were tender. (EX-6, p. 29). A cervical spine MRI, which was taken on May 8, 2002, revealed multi-level degenerative disc disease with a large left mixed spondylotic protrusion at C3-4 causing compression of the exiting nerve root as well as multi-level uncovertebral joint degenerative change. (EX-6, p. 46). On May 10, Dr. Shackleton recommended a cervical epidural steroid injection and referred Claimant to Dr. Hubbell. Dr. Shackleton also wanted Claimant to continue physical therapy, which was providing some benefit. (EX-6, p. 23).

On June 4, 2002, Dr. Shackleton summarized Claimant's condition. His impression was cervical degenerative disc disease and foraminal stenosis at C3-4. Dr. Shackleton again recommended a cervical epidural but still believed that Claimant was able to do light duty work. Dr. Shackleton expressed his desire to take Claimant off narcotics if possible. (EX-6, p. 24). On June 11, Dr. Shackleton reiterated that Claimant would be best suited for sedentary to light duty work with no prolonged looking up or working overhead. (EX-6, p. 25).

Medical Records of Paul J. Hubbell, M.D.

On May 28, 2002, Dr. Hubbell saw Claimant on a follow up. He noted that Dr. Shackleton had recommended a cervical epidural steroid injection. Dr. Hubbell explained the benefits of the procedure to Claimant and noted that if Claimant did not experience relief, he might need a repeat injection or surgery. (CX-2, p. 46).

On July 23, 2002, Claimant saw Dr. Hubbell following epidural steroid injections at C4 and C5 on the left. Claimant reported a few days of complete relief but continued to complaint of neck pain and headache afterward. Dr. Hubbell noted that Claimant's imaging studies indicated multi-level cervical spondylosis. He suggested cervical facet nerve blocks bilaterally from C2 through C7. (CX-2, p. 45). On August 29, Dr. Hubbell saw Claimant after the cervical facet blocks were administered. Because Claimant only received five to six days of pain relief, Dr. Hubbell suggested radiofrequency pulsed mode ablation. (CX-2, p. 43).

On October 1, 2002, Claimant saw Dr. Hubbell after undergoing the radiofrequency treatment from C2 through C7 on the left. He continued to complain of neck pain and was experiencing muscle spasms. Dr. Hubbell increased the dosage of one of Claimant's medications and set him up to undergo radiofrequency treatments on the right side. (CX-2, p. 41). On October 31, Dr. Hubbell gave Claimant some medication for his muscle spasms. (CX-2, p. 39). On November 21, Claimant presented with complaints of persistent pain on the left side of his neck and shoulder radiating into the left arm. Dr. Hubbell noted that the radiation was not in a dermatomal pattern. Claimant was receiving little relief form his pain medication. Dr. Hubbell prescribed a different pain medication and still planned to do the right radiofrequency treatment. (CX-2, p. 38).

On January 7, 2003, Claimant returned to Dr. Hubbell after undergoing this treatment. He reported diminished headaches and had better range of motion but continued to complain of significant pain in the left neck, shoulder and arm. Claimant had significant paraspinous cervical muscle spasms. Dr. Hubbell ordered a two week course of physical medicine therapy for Claimant to attend three times a week. (CX-2, p. 37). On February 11, after completing the course, Claimant reported no real improvement in his neck and shoulder pain. Dr. Hubbell recommended a current perception threshold sensory nerve evaluation from C2 through C7 to determine the source of Claimant's pain. Dr. Hubbell prescribed Claimant a skin patch pain medication. (CX-2, p. 33).

On March 11, 2003, Claimant returned and told Dr. Hubbell that the skin patch did not work for him. Dr. Hubbell began prescribing methadone for Claimant's pain, and although Claimant reported side effects, Dr. Hubbell encouraged him to continue to use the medication so that his body could adjust to it. (CX-2, p. 31).

On April 10, 2003, after receiving the results of Claimant's current perception threshold test, Dr. Luis Hernandez noted that the findings only indicated mild neuritis at C2. Claimant's pain complaints remained unchanged. Dr. Hernandez planned to start Claimant on a course of physical medicine therapy to improve his muscle spasms. (CX-2, p. 29). By May 23, Claimant had completed his last therapy treatment. The course of treatment had reduced his pain level from a seven to a five, and he reported three to four hours of relief after each session, but his general complaints remained unchanged. Dr.

Hernandez recommended epidural steroid injections bilaterally at C6 and C7. If there was no improvement, Dr. Hernandez planned to go forward with discography for the herniated disc at these levels. In the meantime, Claimant was to continue with physical medicine therapy. (CX-2, p. 28).

On October 14, 2003, Dr. Hubbell saw Claimant after a cervical epidural steroid injection. Claimant reported no pain relief from the injection and increased pain in the neck and left upper extremity. Imaging studies indicated severe lateral recess and foraminal stenosis with compression of the exiting nerve root at C3-4, C4-5 and C5-6. Dr. Hubbell recommended left transforaminal epidural steroid injections at C4, C5 and C6 and mentioned the possibility of discography. Claimant had been taking more methadone than he had been prescribed, and Dr. Hubbell explained that Claimant should not increase his medications without instructions from the doctor. However, he did increase Claimant's dosage of methadone because Claimant reported better pain relief with the increased amount of medication. (CX-2, p. 25).

Medical Records of Mary Mathai, M.D.

Dr. Mathai evaluated Claimant on July 8, 2002. Claimant reported severe low back pain, aching pain in his hips, thighs and lower legs and weakness in the leg muscles. He also reported pain, numbness and tingling in the left arm as well as headaches and dizziness. He told Dr. Mathai that his pain prevented him from working. (EX-10, p. 1).

Upon physical examination, Claimant had normal range of motion in the cervical spine, although he had neck pain on compression. (EX-10, p. 2). Likewise, he had full range of motion and muscle strength in the shoulders, elbows, wrists, hands, hips, knees and ankles. Dr. Mathai's diagnosis was neck pain clinically with right C6 radiculopathy with absent reflexes. She noted that a previously taken MRI indicated spondylosis and uncovertebral arthritis, while a prior x-ray indicated C6-7 disc disease. Dr. Mathai also diagnosed Clamant with lower back pain clinically with probable L4 radiculopathy with decreased knee reflexes.

Dr. Mathai opined that Claimant was not a candidate for any job involving prolonged working, standing, bending, pulling, pushing and heavy lifting but that Claimant did not require an assistive device for ambulation. (EX-10, p. 3).

Medical Records of John B. Cazale, M.D.

On October 25, 2002, Claimant saw Dr. Cazale for orthopedic evaluation of his neck, left shoulder and left arm. Dr. Cazale reviewed Claimant's treatment records and cervical spine MRI and conducted a physical examination. Claimant had near full range of motion of the cervical spine. He complained of diffused tenderness to palpation over the spine and the trapezius muscle with no focal or trigger point. Neurological reflexes

were normal, and there was full range of motion in the shoulders and elbows, with no atrophy present in the upper extremities or hands. (CX-3, p. 6). Upon studying Claimant's cervical MRI, Dr. Cazale observed a disc spur complex at C3, C4, as well as some narrowing of the cervical canal and encroachment of the neuroforamen on the left at this level. All other degenerative changes on the cervical spine were minor in nature.

Dr. Cazale's impression was cervical spondylosis and degenerative changes at C3, C4. He believed that these problems were causing Claimant's symptoms. He noted that Claimant had undergone an appropriate course of conservative care. Dr. Cazale opined that if Claimant's pain was manageable, he should be able to return to work at a sedentary or light duty level, so long as he did not lift, push or pull objects within ten to fifteen pounds, climb or do any overhead work. (CX-2, p. 7).

Deposition of Gordon P. Nutik, M.D.

Dr. Nutik is an orthopedic surgeon who examined Claimant on February 6, 2004, at the behest of Kvaerner's third-party administrator. (K-6, pp. 6-7). The purpose of the examination was to provide an independent medical evaluation of Claimant's neck and upper back condition. (K-6, p. 8).

Upon physical examination, Claimant had localized pain in the neck around the left trapezius muscle but no pain or spasm on the cervical spine itself. Claimant's left shoulder motion was normal. There were no findings to indicate an underlying impingement. (K-6, p. 11). The mid-back was symptomatic from T1 to T4 and on the left side of the paravertebral muscles. (K-6, pp. 11-12). Previously taken x-rays indicated some degenerative changes with loss of signal intensity at C2-3, C3-4, C4-5 and C7-T1, as well as some osteophytes at C2, C5, C6 and C7. There was a left-sided disc herniation at C3-4. (K-6, p. 12). X-rays taken by Dr. Nutik revealed slight narrowing at C5-6 and C6-7, small osteophytes at C5, C6 and C7 and slight encroachment of the foramen at C3-4, C4-5, C5-6 and C6-7 on the right and left sides.

After examining Claimant, Dr. Nutik opined that Claimant had sustained an onset of left-sided neck pain while working at Kvaerner in October 2001. (K-6, p. 13). He suspected that Claimant might have sustained a soft tissue strain around the neck and could not rule out the possibility that the disc herniation at C3-4 was related to the workplace incident. On the other hand, Dr. Nutik could not rule out the possibility that the disc herniation was a pre-existing condition. Dr. Nutik noted that the existing medical records documented left-sided complaints which were correlated by the MRI findings.

Dr. Nutik opined that Claimant had a poor prognosis for returning to work because he had been out of work for two years and had multi-level changes in his neck. Dr. Nutik felt that Claimant would be restricted to sedentary/light duty work. Based on the

information that he had, Dr. Nutik initially felt that the current complaints were related to the initial report of pain in October 2001. (K-6, p. 14). He suggested that Claimant might need to undergo an anterior cervical fusion at C3-4. (K-6, p. 15).

After Dr. Nutik received some more documents, including Claimant's depositions, he realized that he could only speculate as to causation on the neck and left shoulder complaints. He noted that there was no documentation of a specific injury at Kvaerner other than that Claimant's report of complaints while doing his normal welding activity. (K-6, pp. 15-16). In addition, there was no documentation of a specific injury or complaints of neck and left shoulder pain at Avondale. Dr. Nutik felt, however, that there might have been some aggravation of the pre-existing condition during that time. (K-6, p. 16). He testified that Claimant probably had a longstanding degenerative condition in his neck, and it was likely that the welding activities at Avondale might have aggravated his underlying symptoms. (K-6, pp. 20-21). He testified that in Claimant's case, an accurate history was very important because "really that's all we have in this case." (K-6, p. 16).

After Dr. Nutik reviewed six job descriptions identified in a labor market survey, he felt that Claimant was able to do four of the six jobs. Dr. Nutik was concerned about Claimant's ability to do the chauffeur job because he would be required to lift up to twenty pounds, which would probably exceed his restrictions. (K-6, p. 17). He also doubted Claimant's ability to do the security officer job, which involved occasional lifting of ten to twenty pounds. (K-6, pp. 17-18). In addition, Dr. Nutik noted that Claimant might not be capable of driving for the dental lab because he was on narcotic pain medication. (K-6, p. 18).

When asked about a June 11, 2002 note in which Dr. Shackleton commented that Claimant had a "patchy, decreased sensation that does not follow a specific dermatomal pattern," Dr. Nutik testified that this comment meant that Dr. Shackleton could find no anatomical basis for a nerve root problem. (K-6, pp. 18-19).

Vocational Evidence

Wage Records from Worldwide Labor

According to these wage records, Claimant worked at Vessel Tech from July 18, 2001, through August 9, 2001. Claimant then worked at Kvaerner from October 1, 2001, through November 11, 2001. Claimant earned gross wages of $7,112.91 while working at these two job sites for Worldwide in 2001.

Wage Records from Northrop Grumman Ship Systems

In 2000, Claimant earned gross wages of $79.28 at Avondale. In 2001, Claimant earned gross wages of $1,546.61. In 2002, he earned gross wages of $3,789.47. (R-11, p. 1).

Vocational Rehabilitation Report of Nancy Favaloro

On January 27, 2004, Ms. Favaloro completed a labor market survey for Claimant. (K-4, p. 1). After reviewing Claimant's educational background, work history and medical information, Ms. Favaloro identified six different sedentary level jobs which she felt were appropriate for Claimant. (K-4, pp. 1-4).

A position as a delivery driver with a dental lab entailed local driving in a company vehicle. Claimant would alternately sit, stand and walk. No overhead work or lifting over ten pounds was involved. The job paid $6.50 per hour.

A position as a chauffeur involved picking up and transporting passengers to various destinations in the New Orleans area. Claimant would be seated when driving and could alternate postural positions. A twenty pound lifting restriction was possible. The job paid $25,000 to $30,000 per year.

A job as a parking lot cashier entailed taking tickets and payments from customers and giving change and receipts. Claimant would be required to lift no more than ten pounds and could walk and stand as needed. Wages were $5.50 to $6.50 per hour.

A job as a casting technician involved manual operation of machines to manufacture plastic shells for hearing aids. Claimant would be required to read and follow custom orders. (K-4, p. 3). The sitting and standing time would be equally divided. This job involved no overhead work and no lifting over one to two pounds. Wages were $8.50 to $9.00 per hour.

A position as an unarmed security guard involved sitting and watching security monitors or asking people to sign in as they enter a building. Claimant would complete basic incident reports but would not apprehend perpetrators. Many assignments would enable Claimant to remain seated for the majority of his shift. There would be occasional lifting of ten to twenty pounds, and the job paid $6.00 to $7.00 per hour.

Finally, a position as a booth cashier or a garage cashier entailed receiving parking fees from customers, giving correct changes and accepting payment. Basic math skills were necessary. Claimant would be able to alternately stand as needed. One company paid $6.25 to $6.75 per hour, while the other company paid $6.50 per hour. (K-4, p. 4).

Ms. Favaloro concluded that Claimant was employable in the New Orleans area at wage rate of $6.00 to approximately $12.00 per hour. (K-4, p. 4).

III. DISCUSSION

Credibility

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

Claimant in this case was not a particularly credible witness who, *inter alia*, acknowledged at the hearing that he lied on his Avondale job application when he failed to disclose his prior neck and shoulder injury or his termination from Kvaerner. However, there is objective medical evidence in the record which, at least in part, supports his subjective testimony as to his neck problems. Thus, while the Court does not rely entirely upon Claimant's subjective testimony in making its findings, Claimant's corroborated testimony will be credited accordingly.

Causation

Section 20(a) of the Act provides the claimant with a presumption that his disabling condition is causally related to his employment if he shows he suffered a harm and employment conditions existed which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once the claimant proves these elements, the claimant has established a prima facie case and is entitled to a presumption that the injury arose out of the employment. Keliata v. Triple Machine Shop, 13 BRBS 326 (1981); Adams v. General Dynamics Corp., 17 BRBS 258 (1985). With the establishment of a prima facie case, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. James v. Pate Stevedoring Co., 22

BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

An injury occurs when something unexpectedly goes wrong within the human frame. Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). An external, unforeseen incident is not necessary; experiencing back pain or chest pain at work can be sufficient. Darnell v. Bell Helicopter Int'l Inc., 16 BRBS 98 (1984). If an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant condition is compensable. The relative contributions of the work-related injury and prior condition are not weighted in determining the claimant's entitlement ("aggravation rule"). Wheatley, 407 F.2d at 307.

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption by presenting substantial countervailing evidence that the injury was not caused by the employment. See 33 U.S.C. § 920(a). The Fifth Circuit addressed the issue of what an employer must do in order to rebut a Claimant's prima facie case in Conoco v. Director, OWCP, 194 F.3d 684 (5th Cir. 1999). In that case, the Fifth Circuit held that to rebut the presumption, an employer does not have to present specific and comprehensive evidence ruling out a causal relationship between the claimant's employment and his injury. Rather, to rebut a prima facie presumption of causation, the employer must present substantial evidence that the injury is not caused by the employment. Noble Drilling v. Drake, 795 F.2d 478 (5th Cir. 1986), cited in Conoco, 194 F.3d at 690.

As a result of a successful rebuttal of the presumption by the employer, the fact finder must evaluate the record evidence as a whole in order to resolve the issue of whether or not the claim falls within the Act. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982). I must weigh all the evidence in the record and render a decision supported by substantial evidence. See Del Vecchio, 296 U.S. 280 (1935).

Claimant in this case alleges that his current complaints of neck pain are causally related to his work at the Kvaerner shipyard. In October 2001, Claimant began to experience neck pain at work. There was no specific incident or injury, but rather the onset of pain allegedly occurred as the result of Claimant's continuous welding in an incline position. Claimant reported the onset of pain to his coordinator and saw a doctor soon thereafter. Claimant was diagnosed with left cervical strain and left trapezius myofascitis and was returned to work with restrictions. Based on Claimant's corroborated testimony, I find Claimant suffered an injury to his neck and shoulder while working at Kvaerner. I further find that employment conditions existed at Kvaerner which could have caused the condition. I find that Claimant has established a prima facie

case and is entitled to a presumption that the injury arose out of the employment at Kvaerner.

Worldwide argues that Claimant did not sustain an injury at Kvaerner and that even if he did, the disability was temporary and had resolved by the time that Claimant alleged the second injury at Avondale. Worldwide points out that Claimant was able to pass a physical at Avondale soon after his alleged injury at Kvaerner. In addition, Worldwide cites the testimony of Dr. Nutik, who agreed that Claimant's welding activities during his stint at Avondale "might have aggravated some of the underlying symptoms." I find this testimony sufficient to rebut the Section 20(a) presumption.

However, in contrast to the incident at Kvaerner, and aside from the speculative testimony of Dr. Nutik, there is no evidence to support the existence of an injury at Avondale. In fact, Claimant's own attorney referred to this alleged injury as a "red herring" in this case. Although Claimant testified that he stopped working at Avondale after suffering a flare up of neck and shoulder pain, he only ever reported an unrelated eye injury before going off work. As Avondale has pointed out, Claimant's failure to report the alleged aggravation was "in stark contrast" to how he duly reported the eye injury and filled out an injury report. Dr. Shackleton, who saw Claimant the day after the alleged neck aggravation, found nothing to indicate such an aggravation and merely diagnosed Claimant with chronic neck sprain. Finally, even Dr. Nutik acknowledged that the history given by Claimant was "really. . . all that we have," and as previously noted, Claimant was not a credible witness and therefore cannot be relied upon to give an accurate history of his alleged injuries. In sum, the evidence fails to establish the occurrence of an injury or aggravation in February 2002. I find that there is no causal relationship between Claimant's neck and shoulder complaints and his employment at Avondale.

With regard to the November 2001 injury, it has also been argued that Claimant's lack of credibility weighs against a finding of causation. Kvaerner has pointed out that this injury was unwitnessed and that the only evidence of causation comes from Claimant's own reports and testimony, which cannot be fully credited. On the other hand, Claimant has been a welder on an intermittent basis for many years, and there is no evidence in the record to indicate that he was ever treated for a neck or shoulder injury before November 2001. Thus, even though Claimant is not fully credible, it is instructive to note that there are objective medical findings to corroborate his complaints after November 2001, while there are no such findings to indicate any problems before that time. Thus, I find that Claimant's current neck and shoulder problems are causally related to his employment at Kvaerner.

Nature and Extent

Having established work-related injuries, the burden rests with the claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbldg. Constr. Co., 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Trask, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette W. Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbldg. & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enter., Ltd., 14 BRBS 395 (1981).

On June 4, 2002, Dr. Shackleton, Claimant's treating physician, summarized Claimant's condition. Although he recommended further treatment, he opined that Claimant was able to do light duty work. It is clear from the medical evidence that there has been little to no change in Claimant's condition since that time. I therefore find that Claimant reached MMI on June 4, 2002.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121, 122 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss or a partial loss.

A claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

Although Claimant had unspecified restrictions immediately following his injury at Kvaerner, Claimant returned to his previous employment at Kvaerner. There is nothing to indicate that Claimant suffered any economic loss as a result of his injury prior to February 13, 2002. Accordingly, Claimant is entitled to no compensation during this period.

It is undisputed that Claimant has been unable to return to his former employment as a welder since his last day of work at Avondale on February 13, 2002. Thus, Claimant has established a prima facie case for total disability after February 13, 2002.

Suitable Alternative Employment

Once a claimant has established a prima facie case for total disability, the employer may avoid paying total disability benefits by showing that suitable alternative employment exists that the injured employee can perform. The claimant does not have the burden of showing there is no suitable alternative employment available. Rather it is the duty of the employer to prove that suitable alternative employment exists. Shell v. Teledyne Movable Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 111 BRBS 635 (1979). The employer must prove the availability of actual identifiable, not theoretical, employment opportunities within the claimant's local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience and physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir. 1993), cert. denied, 511 U.S. 1031 (1994); Turner, 661 F.2d at 1041-1042. The employer need not place the claimant in suitable alternative employment. Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 201, 16 BRBS 74, 75 (CRT) (4th Cir. 1984), rev'g 13 BRBS 53 (1980); Turner, 661 F.2d at 1043; 14 BRBS at 165. However, the employer may meet its burden by providing the suitable alternative employment. Hayes, 930 F.2d at 430.

If the employer has established suitable alternative employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available and must establish a willingness to work. Turner, 661 F.2d at 1043.

Employers may rely on the testimony of vocational experts to establish the existence of suitable jobs. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236 (1985); Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985); Berkstresser v. Washington

Metro. Area Transit Auth., 16 BRBS 231, 233 (1984); Bethard v. Sun Shipbldg. & Dry Dock Co., 12 BRBS 691 (1980); Pilkington v. Sun Shipbldg. & Dry Dock Co., 9 BRBS 473; 477-80 (1978). See also Armand v. American Marine Corp., 21 BRBS 305 (1988) (job must be realistically available). The counselors must identify specific available jobs; market surveys are not enough. Campbell v. Lykes Bros. Steamship Co., 15 BRBS 380, 384 (1983); Kimmel v. Sun Shipbldg. & Dry Dock Co., 14 BRBS 412 (1981). See also Williams v. Halter Marine Serv., 19 BRBS 248 (1987) (must be specific, not theoretical, jobs). The trier of fact should also determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. Villasenor v. Marine Maintenance Indust., 17 BRBS 99, motion for recon. denied, 17 BRBS 160 (1985). To calculate a claimant's wage earning capacity, the trier of fact may average the wages of suitable alternative positions identified. Avondale Indust. v. Director, OWCP, 137 F.3rd 326 (5th Cir. 1998).

Every doctor who has examined Claimant agrees that he is able to return to sedentary to light duty work. Ms. Favaloro identified six potential jobs for Claimant in a labor market survey, and Dr. Nutik approved four of those jobs, eliminating only the two positions which required lifting ten to twenty pounds. Based on the record in this case, I can find no reason that Claimant should not be capable of returning to sedentary/light duty work. In addition, I find that the delivery driver, parking lot cashier, casting technician and booth cashier/garage cashier jobs all constitute suitable alternative employment for Claimant. Thus, I find that Claimant is entitled to permanent partial disability commencing on January 27, 2004, and continuing, based on an AWW of $414.97 and a residual wage-earning capacity of $277.50.

Average Weekly Wage

Sections 10(a) and 10(b) are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is permanent and continuous. Duncan-Harrelson Co. v. Director, OWCP, 686 F.2d 1336, 1342 (9th Cir. 1982), vacated in part on other grounds, 462 U.S. 1101 (1983). The computation of average annual earnings must be made pursuant to subsection (c) if subsections (a) or (b) cannot be reasonably and fairly applied. 33 U.S.C. § 910. Section 10(a) applies where an employee "worked in the employment . . . whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 135-136 (1990); Mulcare v. E.C. Ernst, Inc., 18 BRBS 158 (1986). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" prior to injury. Gatlin, 936 F.2d at 21, 25 BRBS at 28 (CRT); Duncan-Harrelson, 686 F.2d at 1341; Duncan, 24 BRBS at 135; Lozupone v. Lozupone & Sons, 12 BRBS 148, 153 (1979).

When there is insufficient evidence in the record to make a determination of average weekly wage (AWW) under either subsections (a) or (b), subsection (c) is used. Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 5 BRBS 23, 25 (9th Cir. 1976), aff'g and remanding in part 1 BRBS 159 (1974); Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991); Lobus v. I.T.O. Corp., 24 BRBS 137 (1991); Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981). Subsection (c) is also used whenever subsections (a) and (b) cannot reasonably and fairly be applied and therefore do not yield an average weekly wage that reflects the claimant's earning capacity at the time of the injury. Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); Walker v. Washington Metro Area Transit Auth., 793 F.2d 319 (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987); Browder v. Dillingham Ship Repair, 24 BRBS 216, 218 (1991).

It is clear from the wage records submitted that Claimant was not a regular worker. During his employment history, he has sometimes gone for a few years at a time without earning any wages. In more recent history, he only earned $4,446.63 in 1999. In 2000, he earned $9,290.99. As Claimant likewise only worked for a short time during the year before his October 2001 injury, § 10(c) is the appropriate means of calculating his average weekly wage.

Claimant began working for Worldwide on July 18, 2001, and stopped working for Avondale on February 13, 2002. As previously noted, Claimant earned $7,112.91 in gross wages while working for Worldwide over a nine-week period in 2001. He earned a total of $5,336.08 in gross wages while working for Avondale in late 2001 and early 2002. There is no indication that Claimant worked at any time in 2001 before July. Over the thirty-week period between July 18, 2001, and February 13, 2002, he earned $12,448.99 in gross wages, reflecting the total combined amount of earnings from Worldwide and Avondale. The most reasonable means of calculating Claimant's AWW under § 10(c), taking into account both his high-earning capacity as a welder and the fact that he was not a regular worker, is to divide his total earnings during that time by thirty, such that Claimant's AWW is $414.97 for purposes of compensation.

Responsible Employer

The Fifth Circuit has designated nine factors which determine whether a business has effectively borrowed a labor provider's employees and is thus responsible for the employee's compensation upon accident. Brown v. Union Oil Co. of Cal., 984 F.2d 674, 676 (5th Cir. 1993), on remand 1994 WL 660530 (E.D. La. 1994), aff'd, 77 F.3d 479 (5th Cir. 1996); Billizon v. Danos and Curole Marine Contractors, Inc., 993 F.2d 104, 105 (5th Cir. 1993), reh'g denied, 3 F.3d 441 (5th Cir. 1993); Gaudet v. Exxon Corp., 562 F.2d 351 (5th Cir. 1977), cert. denied, 436 U.S. 913 (1978); Ruiz v. Shell Oil Co., 413 F.2d 310 (5th Cir. 1969). No single factor, or combination of them, is determinative.

Brown, 984 F.2d at 676. While "control" has been a central factor in many cases, the Fifth Circuit specifically affirmed that no one factor is decisive and no fixed test is used to determine the existence of a borrowed-servant relationship. West v. Kerr-McGee Corp., 765 F.2d 526 (5 Cir. 1985).

Although this test is not mandatory authority outside of the Fifth Circuit, it provides instructive analysis on the issue of compensation within the context of a contractor/subcontractor situation. The nine factors and the applicable evidence in the instant cases are enumerated and explored below.

1. Who had control over the employee and the work he was performing, beyond mere suggestion of details or cooperation?

In Oilfield Safety and Mach. Specialties, Inc. v. Harman Unlimited, Inc., 625 F.2d 1248 (5th Cir. 1980), the Fifth Circuit held that the correct test is the relative nature of work test. The relative nature of work test is used in place of the "right to control test," without, however, rendering the right to control test and its factors irrelevant. The factors should be used in determining an employer-employee relationship. In determining an employer-employee relationship pursuant to the nature of work test, one examines the nature of the claimant's work in relation to the regular business of the employer. This examination must focus on two distinct areas: the nature of the claimant's work and the relation of that work to the alleged employer's regular business, namely the skills required to do the work, the degree to which the work constitutes a separate calling or enterprise and the extent to which the work might be expected to carry its own accident burden. Oilfield Safety, 625 F.2d at 1253.

In this case, Claimant testified that Kvaerner hired its own welders and assorted other laborers but that Worldwide provided welders and fitters in its capacity as a labor supplier. Mr. Giantomaso, the vice president of human resources for Kvaerner, testified that Kvaerner supervisors oversaw the work of contract employees if they were working as supplemental employees within the team of Kvaerner workers. Mr. Giantomaso testified that if Kvaerner was unsatisfied with the work of a Worldwide employee, the company would inform Worldwide that the employee should be discharged. Claimant testified that he was terminated by Kvaerner.

Worldwide, on the other hand, was responsible for transporting its employees to the shipyard. Worldwide had an on-site coordinator who acted as a liaison between its employees and Kvaerner. Worldwide provided Claimant with a per diem and also paid his wages via its PEO.

Since Kvaerner's supervisors oversaw contract workers, and Claimant was a contract worker, I find that this factor weighs in favor of a finding that Kvaerner had borrowing employer status at the time of Claimant's accident.

2. Whose work was being performed?

By working at the shipyard, Claimant was performing Kvaerner's work. On the other hand, by providing labor to a contractor, he was also performing Worldwide's work. As this issue can be viewed in two different ways, it will be given little weight in the determination of borrowing employer status. That being said, I find that this factor weighs in favor of a finding that Kvaerner had borrowing employer status at the time of Claimant's accident.

3. Was there an agreement, understanding or meeting of the minds between the original and the borrowing employer?

According to the contract between Kvaerner and Worldwide, Worldwide was required to indemnify Kvaerner for any injury which might occur to Worldwide employees at the shipyard. This factor weighs against a finding that Kvaerner was a borrowing employer at the time of Claimant's accident.

4. Did the employee acquiesce in the new work situation?

The focus of this factor is whether the employee was aware of his work conditions and chose to continue working in them. Brown v. Union Oil Co. of Cal., 984 F.2d 674, 678 (5th Cir. 1993). Claimant wore a Kvaerner-supplied uniform and testified that the Worldwide employees worked under Kvaerner's supervision. Nonetheless, Claimant gave no indication that he believed that Kvaerner was his employer. Claimant testified that he was sent to Philadelphia at Worldwide's behest. Worldwide paid for Claimant to travel to Philadelphia, and he paid for his hotel room out of the per diem supplied by Worldwide. Finally, Claimant reported his injury to Worldwide's on-site coordinator. This factor weighs against a finding that Kvaerner was a borrowing employer at the time of Claimant's accident.

5. Did the original employer terminate his relationship with the employee?

In Capps v. N.L. Baroid-NL Indus. Inc., 784 F.2d 615 (5th Cir. 1986), the Fifth Circuit stated that this factor focuses on the original employer's relationship with the claimant while the borrowing occurred but does not require the lending employer to have completely severed its relationship with the worker for borrowed employee status to exist. Capps, 784 F.2d at 617-18. In this case, Worldwide paid Claimant for the time that he spent working at Kvaerner. In addition, Worldwide's on-site coordinator at the shipyard filled out an accident report and took Claimant to get medical treatment when Claimant was injured. Worldwide was in the business of supplying laborers to contractors, and as such, it did not terminate its employer-employee relationship with Claimant when it sent him from one job site to another; rather, it perpetuated that

relationship. This factor weighs against a finding that Kvaerner had borrowing employer status at the time of Claimant's accident.

6. Who furnished tools and places for performance?

Claimant testified that the Worldwide employees wore uniforms and identification badges supplied by Kvaerner. However, Mr. Giantomaso testified that Worldwide provided its employees with their safety equipment. If Kvaerner supplied any equipment to Worldwide employees, Worldwide had to pay for it. In addition, Worldwide transported the workers to Philadelphia and made sure that they got to work each morning. This factor weighs against a finding that Kvaerner had borrowing employer status at the time of Claimant's accident.

7. Was the new employment over a considerable length of time?

As the Fifth Circuit noted in Brown and Capps, supra, length of employment is often neutral and is not indicative of borrowed employee status. Claimant worked for Worldwide for a total of about nine weeks in 2001. During that time, he worked at both Vessel Tech and Kvaerner. While Claimant was injured at Kvaerner, he would have been paid by Worldwide regardless of where he was working at the time of injury. This factor is entitled to little weight in the determination of borrowing employer status, but any weight it is accorded weighs against a finding that Kvaerner was a borrowing employer at the time of Claimant's accident.

8. Who had the right to discharge the employee?

Mr. Giantomaso testified that if Kvaerner was unsatisfied with the work of a Worldwide employee, the company would inform Worldwide that the employee should be discharged. Claimant testified that he was terminated by Kvaerner. Because Claimant is a less than credible witness and there is no objective evidence to support his testimony as to this issue, this factor will be given little weight in the borrowing employer analysis. While Kvaerner had the ability to make a recommendation to Worldwide about firing employees, Mr. Giantomaso's testimony indicates that the ultimate responsibility for termination rested with Worldwide. This factor weighs against a finding that Kvaerner was a borrowing employer at the time of Claimant's accident.

9. Who had the obligation to pay the employee?

Claimant received his pay checks from Worldwide via its PEO. Worldwide also provided Claimant with a $60 per diem and paid for his travel to Philadelphia, although it later deducted those expenses from his checks. Both Kvaerner and Worldwide kept track of the time sheets. Despite the fact that Kvaerner kept its own records of work time,

Worldwide was responsible for paying Claimant. This factor weighs against a finding that Kvaerner had borrowing employer status at the time of Claimant's accident.

Upon weighing all the relevant factors in this case, it is clear that Worldwide maintained control over Claimant's pay and agreed with Kvaerner to be responsible for Claimant and its other employees in the event of a workplace injury. Notwithstanding Kvaerner's ability to supervise Claimant's work site performance and to recommend his termination, Worldwide was ultimately responsible for Claimant because it was his primary employer. I find that Kvaerner was not a borrowing employer, and consequently, Worldwide is responsible for payment of Claimant's compensation benefits in this case.

Medical Expenses

Section 7 of the LHWCA provides in pertinent part: "The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order to assess medical expenses against an employer, the expenses must be reasonable and necessary. Pernell v. Capital Hill Masonry, 11 BRBS 582 (1979).

Claimant in this case was sent to Dr. Shackleton at Worldwide's behest and continued treating with Dr. Shackleton until Dr. Shackleton referred him to Dr. Hubbell, another specialist, for further treatment. I find that the treatment with Dr. Hubbell, which was the result of a recommendation by the doctor chosen by Worldwide, constitutes reasonable and necessary medical treatment. Thus, Worldwide is responsible for payment of all expenses incurred during Claimant's past, present and future medical treatment with Dr. Hubbell.

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

It is hereby ORDERED, ADJUDGED AND DECREED that:

1. Employer Worldwide Labor Support shall pay Claimant temporary total disability payments for the time period from on February 13, 2002, through June 3, 2002, based upon an average weekly wage of $414.97 per week.

2. Employer Worldwide Labor Support shall pay Claimant permanent total disability payments for the time period from June 4, 2002, through January 26, 2002, based upon an average weekly wage of $414.97 per week.

3. Employer Worldwide Labor Support shall pay Claimant permanent partial disability payments for the time period commencing on January 27, 2004, and continuing, based upon an average weekly wage of $414.97 per week and a residual wage-earning capacity of $277.50.

4. Employer Worldwide Labor Support shall pay all reasonable and necessary medical expenses related to treatment of Claimant's neck and shoulder condition, including all treatment with Dr. Hubbell.

5. Employer Worldwide Labor Support shall receive a credit for benefits and wages paid.

6. Employer Worldwide Labor Support shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961.

7. Within thirty days of receipt of this Order, counsel for Claimant should submit a fully-documented fee application, a copy of which shall be sent to opposing counsel, who shall have twenty days to respond.

8. All computations of benefits and other calculations which may be provided for in this order are subject to verification and adjustment by the District Director.

So ORDERED.

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LARRY W. PRICE
Administrative Law Judge

LWP:bbd